

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

ROBERT CLINTON BUCY, ET AL) Docket No. A 15-CA-244 SS
) A 15-CA-245 SS
) A 15-CA-1040 SS
) A 15-CA-1041 SS
) A 15-CA-1042 SS
) A 15-CA-1043 SS
) A 16-CA-575 SS
) A 16-CA-599 SS
)
vs.) Austin, Texas
)
BRENT STROMAN, MANUEL CHAVEZ,)
ABELINO "ABEL" REYNA,)
AND JOHN DOE) June 3, 2016

TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE SAM SPARKS

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08:54:39 1 THE COURT: All right. The Court calls 15-CA-1040,
08:54:45 2 Bucy vs. Stroman, et al, 15-CA-1041, 15-CA-1042, 15-CA-1043,
08:54:58 3 15-CA-244, 15-CA-245, 16-CA-575, and 16-CA-599.

08:55:10 4 I think y'all represent all of these cases, so just
08:55:15 5 make your announcements.

08:55:20 6 MR. TITTLE: Your Honor, I'm Don Tittle on behalf of
08:55:22 7 the plaintiffs.

08:55:25 8 MR. BRANDT: Your Honor, Tom Brandt on behalf of Abel
08:55:27 9 Reyna.

08:55:31 10 MR. OLSON: Your Honor, my name is Charles Olson. I'm
08:55:33 11 from Waco and I represent Chief Stroman and Manuel Chavez.

08:55:40 12 MR. DIXON: Your Honor, I'm Mike Dixon. I'm with Mr.
08:55:43 13 Olson's firm representing the same parties.

08:55:45 14 THE COURT: All right. It looks to me like it's kind
08:55:47 15 of catch-22, unless things are happening that I don't know.
08:55:51 16 That's the reason I called this little pow-wow.

08:55:55 17 Here, we've got lawsuits wherein the chief of police,
08:56:04 18 policemen and district attorney are sued, which would normally
08:56:11 19 mean that I can't do anything in this case until the criminal
08:56:15 20 case is over. And I noticed in the paper where they're seeking
08:56:21 21 to disqualify the district attorney, but that won't eliminate the
08:56:26 22 problem. So the criminal case won't be able to proceed because
08:56:31 23 the defendants have a personal interest. I can't proceed because
08:56:37 24 of the criminal case.

08:56:40 25 So if y'all have any novel way of trying to break up

08:56:43 1 this logjam, I'll be glad to listen to you, but I don't see
08:56:47 2 anything until the -- somebody comes in outside of Waco to
08:57:01 3 prosecute these cases. But I'll be glad to listen to you.

08:57:05 4 MR. BRANDT: Your Honor, Tom Brandt for Abel Reyna.

08:57:10 5 I think the newspaper article that you're referring to
08:57:12 6 is probably referring to a motion that's been recently filed and
08:57:16 7 set for hearing in Waco.

08:57:18 8 THE COURT: Well, that's the reason.

08:57:20 9 MR. BRANDT: That is set for a hearing on, I believe,
08:57:23 10 June 13th.

08:57:25 11 THE COURT: And who's going to hear that?

08:57:27 12 MR. BRANDT: That's going to be heard by the judge
08:57:30 13 there, but there is a special prosecutor that's being sworn in to
08:57:35 14 represent Abel Reyna and to resist the disqualification motion.

08:57:47 15 THE COURT: So this is in the state court.

08:57:49 16 MR. BRANDT: It's in state court, so that will be
08:57:50 17 resolved one way or the other very quickly.

08:57:52 18 THE COURT: Is that with a Waco state judge?

08:57:56 19 MR. BRANDT: Waco state judge.

08:57:58 20 THE COURT: All right.

08:57:59 21 MR. BRANDT: And I've been in touch, of course, with
08:58:01 22 Abel Reyna and the special prosecutor who is going to be
08:58:04 23 appointed shortly to deal with that situation, officially
08:58:07 24 appointed. But from my perspective, of course, I think that the
08:58:14 25 disqualification will -- well, I don't know what the district

08:58:17 1 judge will do. But it will be decided presumably on or near the
08:58:24 2 date of the hearing, which is going to be June 13th and 14th.
08:58:28 3 They've set two days to hear that.

08:58:30 4 THE COURT: Now, is it the theory that the special
08:58:33 5 prosecutor will take over entirely the prosecution?

08:58:37 6 MR. BRANDT: I don't think so.

08:58:40 7 Currently, that special prosecutor is just being hired
08:58:44 8 to handle that particular hearing, that is, the disqualification
08:58:50 9 hearing. Now, if the disqualification hearing is unsuccessful
08:58:57 10 for Mr. Reyna, in other words, if he is disqualified, then --

08:59:01 11 THE COURT: Now, who is Reyna?

08:59:04 12 MR. BRANDT: Reyna is the DA and that's who I
08:59:06 13 represent.

08:59:07 14 THE COURT: Yeah.

08:59:08 15 MR. BRANDT: So it probably -- given the current
08:59:12 16 circumstance, I suppose that decision in that case.

08:59:16 17 THE COURT: Will be appealed.

08:59:19 18 MR. BRANDT: Well, but --

08:59:20 19 THE COURT: Will be appealed.

08:59:21 20 You know, I've tried cases in Waco in the early '60s.
08:59:26 21 I'm very familiar with the way things happen in Waco, and right
08:59:28 22 now, I don't even have a judge there. I've got Judge Pitman
08:59:31 23 going down there handling the civil cases. He's disqualified
08:59:35 24 from handling criminal cases.

08:59:37 25 MR. BRANDT: All I really wanted to --

08:59:38 1 THE COURT: That's the only judge I've got available.

08:59:40 2 MR. BRANDT: All I really wanted to add is, since you
08:59:43 3 mentioned this newspaper article, to let you know what I knew
08:59:45 4 about the hearing. It is June 13th.

08:59:48 5 THE COURT: I appreciate it. It's just something that
08:59:50 6 came out from the -- actually, it was, I think, taken from the
08:59:55 7 Waco paper, but I don't remember. It was in the Austin paper.

08:59:59 8 MR. TITTLE: Your Honor, there's an important
09:00:02 9 consideration, I think, bears on this issue. Certainly I would
09:00:07 10 agree if this were a normal case, criminal case waits, we see
09:00:11 11 what happens. Clear. I think it's equally clear it's anything
09:00:17 12 but a normal case.

09:00:19 13 There have -- in addition to the six that are in front
09:00:22 14 of you now, there have been other cases filed, three of which are
09:00:25 15 unindicted. It's been more than a year. Their conditions of
09:00:28 16 bond have been discharged. And as of this morning, there are
09:00:31 17 three additional that fall in that category that have been filed
09:00:33 18 that reside in Austin. So that's six individuals of which this
09:00:38 19 issue of wait until the criminal case is resolved wouldn't apply,
09:00:44 20 unless we were to wait until --

09:00:48 21 THE COURT: Oh, come on, counsel. I'm not a child.

09:00:51 22 They're going to say you can't get into your
09:00:54 23 investigation. They're going to say that you can't have any
09:00:57 24 interviews with people. You're going to be -- sit there with --
09:01:02 25 crippled. You have your clients that could testify. They may

09:01:05 1 get subpoenas to testify in any criminal cases.

09:01:09 2 MR. TITTLE: Okay. Let me --

09:01:10 3 THE COURT: I have cases all the time where the police
09:01:12 4 take the position that they're not going to allow any discovery,
09:01:17 5 or anybody deposed, or anybody talked to, and I have to wait
09:01:23 6 until those criminal cases are over. There's not anything I can
09:01:27 7 do about it.

09:01:27 8 MR. TITTLE: Right. And I understand. I really was
09:01:29 9 commenting more --

09:01:30 10 THE COURT: I don't think it's going to take long. The
09:01:32 11 law's very clear.

09:01:34 12 If you've got an interest in the case -- you know, I
09:01:38 13 tried two cases with Racehorse Haynes. I've had the civil
09:01:42 14 liability, I had the criminal liability, and on the first day of
09:01:45 15 trial, he disqualified the district attorney and the police
09:01:51 16 officers because he had caused some -- they were being sued.
09:01:57 17 Now, they were being sued by the special prosecutor. So he had a
09:02:01 18 pecuniary interest.

09:02:04 19 But these people have a substantial interest. They're
09:02:07 20 being sued in their personal as well as official capacities.
09:02:16 21 Plus the fact I've got -- of course, the first thing I've got to
09:02:22 22 decide is the venue question. And I have half of the Waco cases,
09:02:32 23 anyway, and have had since '91. The only ones I always send back
09:02:37 24 are twofold. I send back -- what is the little community that
09:02:43 25 has a lot of litigation on the other side of Waco as you drive

09:02:49 1 through?

09:02:51 2 MR. OLSON: I'm trying to think, your Honor.

09:02:53 3 THE COURT: It's part of Waco, but it's got a

09:02:56 4 different --

09:02:57 5 MR. OLSON: Bellmead.

09:02:59 6 THE COURT: Bellmead is one.

09:03:01 7 MR. OLSON: Yeah.

09:03:01 8 THE COURT: I always send those cases back.

09:03:03 9 I get an awful lot of medical cases. And I get some
09:03:09 10 substantial cases from the military in Killeen, and if they're
09:03:15 11 appropriate, can be handled generally by magistrates for a while
09:03:20 12 and I send those back. You know, a lot of people don't like to
09:03:29 13 litigate in Waco. Haven't wanted to litigate in Waco for some
09:03:34 14 time.

09:03:35 15 So I don't know what I'm going to do, but it will be a
09:03:41 16 hearing where I'll take some evidence, but I don't think I can
09:03:48 17 set them now. Now, if you disqualified a district attorney, you
09:03:53 18 still have the police officers, and I don't think they're going
09:04:02 19 to come in here and testify on behalf of their motions. That's
09:04:06 20 why I've asked you lawyers to be here.

09:04:09 21 MR. TITTLE: Well, again, with the caveat that it's an
09:04:11 22 extremely unusual case, the whole situation, I don't know that --
09:04:19 23 you're suggesting that --

09:04:20 24 THE COURT: I don't have any suggestion. Until you
09:04:24 25 eliminate one of the two problems, there's not much anybody can

09:04:27 1 do.

09:04:27 2 MR. TITTLE: You're suggesting, though, that this case
09:04:29 3 can't proceed as long as any criminal cases are pending because
09:04:32 4 the DA or the police officers won't be able to testify. This is
09:04:36 5 -- they are charged -- these individuals are charged with crimes
09:04:40 6 in which there was a lifetime statute of limitations. At some
09:04:44 7 point, the people that are unindicted that we believe were
09:04:47 8 falsely arrested, surely they don't have to wait until the entire
09:04:52 9 150 cases that have been indicted so far, every single one of
09:04:55 10 them have been tried, or we would suggest that they don't.

09:04:59 11 So it is because of that unusual situations, I think
09:05:03 12 there are reasons why a number of these civil cases should go
09:05:08 13 forward, and if they're going forward, there's really no reason
09:05:11 14 that even the ones who have been indicted couldn't go forward.
09:05:14 15 Granted, there's the risk that if they were found guilty, work
09:05:18 16 done on that particular case would be for naught. I understand
09:05:21 17 that and recognize that. I would be bearing a substantial part
09:05:26 18 of that risk myself.

09:05:27 19 But of the ones who are unindicted who there is no
09:05:29 20 criminal case against, I don't think that the law would
09:05:32 21 require --

09:05:32 22 THE COURT: How are you going to get into the discovery
09:05:34 23 with any of their investigation, any of their statements by their
09:05:39 24 own people, any of the statements by anybody that's not a police
09:05:45 25 officer? Their investigation -- how are you going to get any of

09:05:48 1 that? They're going to have the criminal law exemption, and I'm
09:05:50 2 going to have to honor it.

09:05:51 3 MR. TITTLE: My clients filed the suit. They're not --
09:05:54 4 I disagree entirely with the defense. They're not going to be
09:05:57 5 taking the Fifth Amendment. They have nothing to take the Fifth
09:05:59 6 Amendment on.

09:05:59 7 Almost all of these individuals gave substantial
09:06:03 8 statements to the police the night that they were detained.

09:06:05 9 THE COURT: You're talking about your clients.

09:06:07 10 MR. TITTLE: And others.

09:06:08 11 THE COURT: I'm not worried about your clients.

09:06:09 12 MR. TITTLE: Well, I -- okay. And as far as the police
09:06:12 13 officers, I don't know of a legal prohibition against an officer
09:06:16 14 giving testimony as to the -- whether statements in his affidavit
09:06:20 15 for probable cause are true. I don't know of any prohibition
09:06:23 16 against that while there's a criminal case pending. He's already
09:06:25 17 testified in multiple examining trials. There's no reason I can
09:06:32 18 think of.

09:06:32 19 I understand your concerns about the DA, himself,
09:06:35 20 testifying, but I think, or I would assume, there would be
09:06:39 21 concerns about him giving a deposition while there's a criminal
09:06:41 22 case going and there's work product --

09:06:43 23 THE COURT: His problem is he's got an interest in the
09:06:45 24 litigation. He's being sued over here for it.

09:06:48 25 MR. TITTLE: I think all of these matters could be

09:06:49 1 handled with some kind of protective order. But with regard to
09:06:52 2 the police officers and the chief and the officers that have been
09:06:56 3 sued, I don't know of any reason or prohibition against them
09:06:58 4 testifying in a civil case while there are 150 or 60 criminal
09:07:04 5 cases pending.

09:07:05 6 For example --

09:07:05 7 THE COURT: Why don't you want to brief that for me?
09:07:08 8 Because I've been -- I've been at this job 26 years and I've been
09:07:12 9 trying cases 53 years.

09:07:14 10 MR. TITTLE: I understand.

09:07:14 11 THE COURT: And I've never seen a civil case allowed to
09:07:21 12 be trial when the criminal case is pending, particularly when
09:07:23 13 it's a criminal case that's had a lot of publicity. And this one
09:07:30 14 has had sufficient publicity. So I'll let you -- you know, next
09:07:37 15 couple of weeks, give me a letter opinion and send counsel.

09:07:44 16 MR. TITTLE: I'll be happy to brief it. I think -- and
09:07:46 17 the last thing I'll say on this.

09:07:48 18 The defendants -- the Court's really raising a question
09:07:50 19 that wasn't even really raised by the defense in their motion.
09:07:55 20 Their suggestion was more, stand down on the criminal cases
09:07:57 21 because if they end up being convicted or conviction, then that's
09:08:00 22 done.

09:08:01 23 THE COURT: I understand. This is my thinking.

09:08:02 24 MR. TITTLE: Right.

09:08:03 25 THE COURT: Because of my -- what happens in the past.

09:08:07 1 And, you know, in addition to that, if I set your case today for
09:08:15 2 trial, it's April of 2018. I am booked solid, 20 civil jury
09:08:21 3 cases every single month. Judge Yeakel and I have the heaviest
09:08:28 4 civil-weighted docket in the United States, and a lot of those
09:08:33 5 are patents cases, which take two weeks to try. Used to take
09:08:37 6 five or four. We've got them down to two.

09:08:41 7 And I'm concerned of what I'm going to do with all
09:08:48 8 these cases. It's just going to be a discretionary move to send
09:08:56 9 it back to Waco. And, you know, you've got some residents here.
09:09:06 10 It's not an open-and-shut area, but as soon as I open it, I've
09:09:11 11 got all sorts of motions coming. You know, I know what's going
09:09:20 12 to happen and I think if you sit down and think it -- but you're
09:09:23 13 not going to get any cooperation from any of these folks, nor
09:09:26 14 their employees, right now.

09:09:28 15 MR. TITTLE: Could I make one more comment?

09:09:30 16 THE COURT: That's why I invited you here.

09:09:31 17 MR. TITTLE: Okay. Thank you.

09:09:33 18 First of all, the discovery that's been produced in the
09:09:37 19 criminal cases is so substantial that there couldn't be any more
09:09:40 20 discovery hardly. But that's -- and that's already been
09:09:43 21 disclosed. So that's that. The trials --

09:09:47 22 THE COURT: Been disclosed how? Just in the papers?

09:09:49 23 MR. TITTLE: In the form of produced to the various
09:09:51 24 criminal defendants. And so, it's been produced, everybody has
09:09:55 25 it. It is so much an amount of -- a hundred-thousand pages.

09:10:00 1 THE COURT: There wasn't a protective order or an
09:10:02 2 agreement not to share?

09:10:04 3 MR. TITTLE: There were for some lawyers signed that,
09:10:06 4 other lawyers refused to sign it and it would be turned over.
09:10:09 5 Under Texas law, the prosecutor cannot have the lawyer sign a
09:10:12 6 confidentiality order on that, and so, I got it without signing a
09:10:15 7 confidentiality order and would not sign it.

09:10:17 8 But your trial docket is one reason, in fact, these
09:10:21 9 cases should go forward. If they are to sit for two or three
09:10:24 10 years, I think longer than that for all of this stuff to work its
09:10:27 11 way through the system, these individuals who you know this
09:10:33 12 backstory on this, they wouldn't have a trial until
09:10:38 13 2020-something. We just think that there has to be some form of
09:10:43 14 just --

09:10:44 15 THE COURT: The criminal trial has to occur. As soon
09:10:47 16 as the criminal trial has occurred, then --

09:10:51 17 MR. TITTLE: There's 150 of them charged. I mean, it's
09:10:54 18 going to take them years to go through that mess.

09:10:57 19 THE COURT: Well --

09:10:58 20 MR. TITTLE: It might -- half of these clients --

09:10:59 21 THE COURT: -- I rather suspect that you're going to
09:11:01 22 get through that fairly quickly.

09:11:04 23 MR. TITTLE: Your optimism is more -- I think it's
09:11:11 24 reasonable to at least think there's a possibility this could be
09:11:14 25 multiple years till he's wrapped this up. He's got a problem.

09:11:18 1 THE COURT: That's right.

09:11:19 2 MR. TITTLE: They haven't even set a single trial date,
09:11:21 3 your Honor. It's been more than a year. The last thing I'll say
09:11:24 4 in terms of --

09:11:24 5 THE COURT: They're going to have to pretty quick. Of
09:11:26 6 course, they're going to have -- may have new people in it. I
09:11:29 7 don't know one way or the other. And then, of course, the next
09:11:31 8 thing is going to be they don't want to try it in Waco. And so,
09:11:34 9 then, you've got that delay. I understand the delay. And I'm
09:11:40 10 sympathetic from the standpoint that I'm very sensitive about
09:11:44 11 moving my cases and getting them out because, you know, we
09:11:52 12 dispose of between 400 and 500 cases every year, and we have more
09:11:59 13 filed every year. We've had more cases filed every year since I
09:12:03 14 came here in 1991.

09:12:05 15 MR. TITTLE: Your Honor.

09:12:06 16 THE COURT: And I had 890 of them when I came here, and
09:12:12 17 that's the problem I have to wrestle with.

09:12:14 18 So your idea is to just go full blow ahead, determine
09:12:19 19 the venue. And it's easy for me. I can send it to Waco, and I
09:12:22 20 don't have to worry about it.

09:12:24 21 MR. TITTLE: We certainly hope that that's not the
09:12:26 22 case.

09:12:26 23 THE COURT: Well, I understand that. But if it's
09:12:29 24 there, it's more manageable because of the other. I'm not saying
09:12:34 25 that I'll do it because there's equity on both sides and, of

09:12:39 1 course, they're filed here to get out of Waco. Although you do
09:12:42 2 have some residents that have the right to have it here. But,
09:12:50 3 you know, you're going to get the discovery, you're going to get
09:12:52 4 the depositions and all of that. But if you read the opinions, I
09:12:57 5 say, so what. It's 100 miles from here.

09:13:01 6 MR. TITTLE: Your Honor, the last thing, there are
09:13:02 7 statute of lim -- there's a two-year statute of limitations.
09:13:05 8 We're already into the second year.

09:13:07 9 THE COURT: They're going to have to do something
09:13:08 10 pretty quick or they're going to have to start dismissing cases.

09:13:11 11 MR. TITTLE: Well, you have more confidence than what's
09:13:13 12 going to occur in Waco than I think anyone else thinks that their
09:13:17 13 system is going to work.

09:13:17 14 THE COURT: I just know what can happen and I know --

09:13:20 15 MR. TITTLE: I've seen --

09:13:21 16 THE COURT: -- how these cases can get into the federal
09:13:22 17 court.

09:13:23 18 MR. TITTLE: Okay. I've seen no judge who's had an
09:13:26 19 opportunity in Waco, despite evidence from the witness stand,
09:13:29 20 that the witness knows of no evidence of a crime. I've seen
09:13:32 21 judges hold probable cause in multiple cases. There has been no
09:13:36 22 indication that a -- that the judiciary in Waco is going to move
09:13:42 23 this along. We are looking for a forum where we can get some
09:13:46 24 justice. And yes, you're right, that's why we're in Austin.

09:13:50 25 But I think the statute of limitations is a serious

09:13:52 1 issue. If we can't be allowed to move forward, there's no chance
09:13:56 2 they're going to be finished inside of two years. In fact, we
09:13:59 3 think it's a delib -- and I point to them, but I mean their
09:14:02 4 clients. We think it's a very deliberate process to get to the
09:14:05 5 two-year mark that they're taking on this. They have not set one
09:14:10 6 single trial setting, and it's been more than a year.

09:14:14 7 So with all of those considerations, we'd like to move
09:14:19 8 forward.

09:14:20 9 MR. OLSON: Judge, if I may very briefly. I don't want
09:14:22 10 to belabor the point.

09:14:23 11 If the two-year statute of limitations we're talking
09:14:26 12 about is the filing of the civil suits, the civil suits can be
09:14:29 13 filed and then, they should be stayed.

09:14:29 14 THE COURT: Well, there's no --

09:14:31 15 MR. OLSON: So there's no prohibition to filing a civil
09:14:33 16 suit, but it just would be -- it would be stayed.

09:14:35 17 We've got a little bit of apples and oranges going on.
09:14:38 18 The Court has called us for a hearing on certain causes, and
09:14:41 19 there's some other cases that have been filed. There haven't
09:14:45 20 been appearances yet, and so forth. We're kind of talking about
09:14:47 21 both of them. The ones that have been filed have been indicted.
09:14:50 22 From the face of the complaint, it says they've been indicted.

09:14:54 23 And the case law that we've cited and the Court is
09:14:58 24 certainly familiar with says, you know, the Court should stay it
09:15:00 25 because we don't want to have collateral attack on a criminal

09:15:03 1 proceeding or something that might turn into a collateral attack
09:15:06 2 on a 1983 or a criminal proceeding. So, you know, the Court --
09:15:10 3 we believe the Court should stay that.

09:15:12 4 In terms of being in Waco, I've gotta tell you, I think
09:15:16 5 Waco's a fine place to try a case in federal court, or state
09:15:19 6 court, or anywhere else. Of course, the Waco Division is much
09:15:22 7 bigger than just Waco and --

09:15:25 8 THE COURT: Thank you for sharing.

09:15:26 9 MR. OLSON: Well, no. That's the point is it's not
09:15:29 10 just about Waco. It is big. I realize the Court understands
09:15:33 11 that.

09:15:34 12 But we will respond to whatever it is that we need to
09:15:38 13 respond to, but we just think from the stay issue, we think the
09:15:42 14 law on the cases have been called hear today certainly -- all of
09:15:45 15 them, the law is very clear that a 1983 action were not meant to
09:15:52 16 preempt criminal cases and could put a lot of things in an odd
09:15:58 17 setting if that were allowed.

09:15:59 18 And, in fact, 1983 actions, based on the authority that
09:16:02 19 we've cited to the Court, should not even be entertained if any
09:16:06 20 of the issues that could be dealt with in those might have an
09:16:09 21 impact on the criminal case. So, for example --

09:16:13 22 THE COURT: Your job is to give me a letter opinion in
09:16:17 23 response to that as to why I don't have the authority after
09:16:21 24 reasonable time to say, the heck with all of this, I'm trying my
09:16:27 25 cases.

09:16:27 1 MR. OLSON: Okay. All right. So --

09:16:28 2 THE COURT: It's been a year and y'all don't even know
09:16:33 3 who is going to prosecute these cases, which is inexcusable.

09:16:35 4 MR. OLSON: I represent the chief of police and a
09:16:37 5 police officer, so I --

09:16:38 6 THE COURT: When I say you, generally --

09:16:40 7 MR. OLSON: Sure.

09:16:40 8 THE COURT: -- I'm just talking to the three of you.

09:16:42 9 MR. OLSON: Sure. The three of us, yes, sir.

09:16:44 10 THE COURT: And you're representing police officers.

09:16:46 11 MR. OLSON: Sure. And we'll be happy to brief -- I
09:16:49 12 mean, I think the answer's going to be the Fifth Circuit has said
09:16:52 13 if there's a pending criminal case, it should be stayed. You
09:16:57 14 shouldn't have a 1983 action outrunning a criminal case so that
09:17:00 15 it can -- we can impact the criminal prosecution.

09:17:04 16 THE COURT: Well, that's -- that authority is for
09:17:10 17 trial. I see a lot of problems before you can get to a trial.

09:17:13 18 MR. OLSON: Okay.

09:17:15 19 THE COURT: So.

09:17:16 20 MR. OLSON: All right, sir. Thank you.

09:17:18 21 THE COURT: Yeah. Well, it's nice that y'all didn't
09:17:22 22 have to drive through the rain to get here. But anything else
09:17:25 23 that you want to say? Because I don't know what else I can do
09:17:30 24 until -- I know the plaintiff wants to start. I guess he might
09:17:41 25 do like I did for ten years, and that is, try cases without any

09:17:46 1 discovery.

09:17:48 2 You couldn't take discovery in the '60s. You can take
09:17:52 3 the plaintiff and the defendant's deposition. Couldn't even get
09:17:55 4 a doctor without a court order, but nobody needed it. And you
09:17:59 5 didn't have any idea who the witnesses would be until they called
09:18:02 6 them, which is, by the way, a great way to try lawsuits.

09:18:08 7 I was, unfortunately, the chairman of the Supreme Court
09:18:10 8 advisory committee that let -- we thought full disclosure and the
09:18:16 9 identity of witnesses and all of that would be better
09:18:23 10 administration of justice. I'm not so sure it is when
09:18:33 11 considering the discovery motions you see nowadays, not in my
09:18:37 12 court, by the way.

09:18:38 13 MR. BRANDT: Your Honor, if I may, we'll be very
09:18:40 14 closely monitoring the hearing that's going to be held in June,
09:18:45 15 the June 13th hearing, and then, I'll be happy to update this
09:18:49 16 court on the results of that.

09:18:52 17 THE COURT: Please.

09:18:53 18 MR. BRANDT: Because that is certainly something you're
09:18:55 19 concerned about, so we'll let you know what happens. Because
09:18:57 20 there is only one criminal defendant who is moving for the
09:19:02 21 disqualification of Mr. Reyna, but the way that decision occurs
09:19:10 22 will affect all the rest of the cases. So I'll let you know how
09:19:13 23 that occurs.

09:19:14 24 THE COURT: What is the situation with the criminal
09:19:16 25 cases? They are indicted, they've been arrested. Are they all

09:19:22 1 on bond? Are none on bond? Or --

09:19:26 2 MR. BRANDT: I believe that they have worked out --
09:19:28 3 originally there was a bond set across the board for everybody,
09:19:31 4 the same amount, but then, they're worked out. So I think they
09:19:34 5 eventually got everyone released on bond. But it took a while to
09:19:40 6 get through all the numbers.

09:19:43 7 But then, we have -- and I don't know the numbers, but
09:19:45 8 we have, I think, 150-something that have been indicted. And
09:19:49 9 there is a group that has not yet been presented to the grand
09:19:52 10 jury. But of all the ones that were presented to the grand jury,
09:19:55 11 all of whom were indicted. So to the extent so far.

09:20:00 12 THE COURT: Makes one wonder why they indicted 150
09:20:07 13 people. I don't need a comment on that. It's just so far from
09:20:16 14 all of the experiences I've had, it's just staggering to think of
09:20:22 15 the problems.

09:20:23 16 MR. BRANDT: I think --

09:20:24 17 THE COURT: Even if you try them one after another,
09:20:26 18 after another, after another, you're going to be defending
09:20:29 19 shortly constitutional cases and I just -- I would prayerfully
09:20:42 20 hope the state courts handle it, but I rather suspect we're going
09:20:46 21 to get in it at some point in time.

09:20:49 22 MR. BRANDT: Thank you.

09:20:49 23 THE COURT: Anything else?

09:20:50 24 MR. BRANDT: No, your Honor.

09:20:51 25 THE COURT: Thanks.

09:20:52 1 MR. TITTLE: Your Honor, just the last thing.

09:20:53 2 And, of course, I'm going to include in the letter
09:20:55 3 brief the -- any case law regarding these unindicted as to how --
09:20:59 4 whether they are, in fact, part of the criminal cases and how
09:21:03 5 long they're going --

09:21:04 6 THE COURT: But understand, counsel, I'm not worried
09:21:06 7 about the indicted or the unindicted.

09:21:11 8 MR. TITTLE: Okay.

09:21:12 9 THE COURT: As far as I'm concerned, every person that
09:21:13 10 you represent has a free right to file a lawsuit and to go to
09:21:17 11 trial. The problem is, how do you go to trial? How do you get
09:21:22 12 your discovery when they say the criminal case is there? And the
09:21:26 13 Fifth Circuit is pretty strong, you want to look at that, that
09:21:29 14 says: Sparks, you screw up all the time, but you can't screw up
09:21:35 15 this way. You can't try a civil case when there's a criminal
09:21:39 16 trial pending.

09:21:44 17 MR. TITTLE: All right. Last thing.

09:21:46 18 On the statute of limitations, just to address what Mr.
09:21:47 19 Olson said, it is true that plaintiff could file a suit at the
09:21:51 20 end of the two year -- before the two years is up; however, they
09:21:55 21 would have been denied an opportunity to find out who are the
09:21:59 22 responsible parties. This is a scenario in which the potential
09:22:03 23 liability to McLennan County and city of Waco is astronomical
09:22:08 24 with these number of plaintiffs. We have sued these people
09:22:11 25 individually.

09:22:12 1 THE COURT: Well, you may. You're telling me you could
09:22:15 2 get all the information because there's no confidentiality
09:22:19 3 agreement or -- and in that way, you could learn some things. On
09:22:30 4 the other hand, you know who the most litigious people are in the
09:22:35 5 federal courts now, particularly in Austin?

09:22:38 6 MR. TITTLE: I'm sorry, mostly what?

09:22:41 7 THE COURT: Litigious. People who litigate. John
09:22:45 8 Does. I don't get any cases anymore in the civil rights area,
09:22:49 9 particularly on excessive force, where I don't have John Does,
09:22:55 10 and they fill those in when they finally can get discovery. And
09:22:59 11 it eliminates the statute of limitations problem you're talking
09:23:02 12 about.

09:23:03 13 MR. TITTLE: I might respectfully disagree on that only
09:23:06 14 because I've had -- I've been the plaintiff who pled John Does,
09:23:10 15 and there's a Fifth Circuit case that indicates that it does not
09:23:14 16 preserve the statute for someone who was not mentioned prior to
09:23:17 17 the expiration of the two years. I could -- I'll include that
09:23:20 18 case law in my letter brief. I know that was raised against me,
09:23:24 19 and I remember the case law was not in my favor. So I even put a
09:23:28 20 John Doe in here.

09:23:29 21 THE COURT: Yeah, I know.

09:23:30 22 MR. TITTLE: As you noticed.

09:23:32 23 But I think we have to name the individual defendants
09:23:34 24 before the two years or it's gone forever; and if that's correct,
09:23:39 25 to not allow discovery for a reasonable period prior to that

09:23:43 1 would essentially limit many of these people to sort of taking a
09:23:48 2 guess as to who they think's responsible before we really look
09:23:51 3 under the hood. And given the exposure, that we'd like more
09:23:57 4 defendants.

09:23:58 5 THE COURT: You -- how many police officers are in
09:24:03 6 McLennan County?

09:24:04 7 MR. TITTLE: Well, there's a lot, but the majority of
09:24:06 8 the police officers who were just crowd control or picking up --
09:24:09 9 you know, they weren't involved in the issues that are anywhere
09:24:12 10 related to this.

09:24:13 11 THE COURT: So you notice somebody for a deposition and
09:24:18 12 their lawyer's telling them to take the Fifth, how are you going
09:24:21 13 to find out anything there?

09:24:22 14 MR. TITTLE: I don't think the police officers are
09:24:24 15 going to take the Fifth. I don't know how they would, but if
09:24:26 16 they did, I guess we could deal with that.

09:24:28 17 THE COURT: You've sued them.

09:24:29 18 MR. TITTLE: Well, I haven't sued them criminally.

09:24:31 19 THE COURT: No, no, no. I mean, but they're out there.

09:24:34 20 MR. TITTLE: Well, your Honor --

09:24:36 21 THE COURT: It's just a problem.

09:24:38 22 MR. TITTLE: It is.

09:24:38 23 THE COURT: If the police officer's told not to testify
09:24:42 24 as to bearing on a criminal case, then you're going to go in
09:24:44 25 there -- and, I don't know, make the state courts operate

09:24:47 1 differently from the federal courts, but I don't have much
09:24:52 2 authority to interfere with the criminal investigation.

09:24:55 3 MR. TITTLE: I don't know of any equivalent --
09:24:59 4 something along the lines of a Fifth Amendment right that the
09:25:02 5 police officers are going to have, unless he actually was
09:25:04 6 criminally -- has some culpability. So I don't think he can
09:25:07 7 refuse to answer unless the court has given that privilege. But
09:25:12 8 I'll research that.

09:25:13 9 But as the Court knows on municipal liability and, you
09:25:17 10 know, all that, that Monell stuff, we can file our pleading the
09:25:22 11 day before the two year runs and add the McLennan County and the
09:25:25 12 city of Waco, and within a day or two, we're going to get these
09:25:29 13 motions to dismiss that we haven't pled sufficient facts, Iqbal,
09:25:34 14 Twombly, all that stuff, despite the plain language of Rule 4.
09:25:38 15 But I will save my soapbox there.

09:25:41 16 But the reality is, unless we have the opportunity to
09:25:45 17 conduct discovery, we could not plead a Monell case. A Monell
09:25:50 18 case has not yet been pled in this case because it would end up
09:25:53 19 getting the normal motion to dismiss, and my guess is we wouldn't
09:25:56 20 be able to --

09:25:57 21 THE COURT: Well, lawyers never do enough homework to
09:26:01 22 put in a policy or the policy is a lack of policy in the
09:26:06 23 pleadings so that they can stand up with regard to what the
09:26:13 24 Supreme Court says is law in municipalities.

09:26:16 25 MR. TITTLE: I do this kind of work and I plead those

09:26:18 1 cases, and I know how to plead a Monell case. And I am no --
09:26:25 2 this area of the law affects our side because it's the catch-22
09:26:29 3 of being able to know what to plead if you can't do some
09:26:31 4 discovery, but you've gotta plead it before you can get to it,
09:26:35 5 you know. But anyway, in this case, there is no way that our
09:26:38 6 Monell claims would survive the challenges unless we're allowed
09:26:45 7 to do some discovery.

09:26:46 8 Right now, we would just be speculating as to what the
09:26:48 9 policy is. And granted, we can do our homework and give it a
09:26:51 10 heck of a try, but I think that is a -- yet, another reason, at
09:26:58 11 some point soon, to allow these cases to go forward.

09:27:02 12 THE COURT: All right.

09:27:03 13 MR. TITTLE: Thank you, your Honor.

09:27:07 14 THE COURT: Okay. Y'all know the problem. Copy each
09:27:15 15 other with the letters you're going to write, and if you have any
09:27:24 16 solution, let me know. Just thinking out of the box here, might
09:27:39 17 see if you can find any authority if you sue the municipality,
09:27:46 18 that you can't take discovery to establish if they have a policy
09:27:54 19 and if not, what are their policies. Actually, most cities now
09:28:10 20 have policies, and all they have to do is respond in the
09:28:22 21 discovery what their policy is for event A, and then, you can go
09:28:32 22 from there. Far more dangerous when they don't respond.

09:28:40 23 MR. TITTLE: This issue is one I deal with so
09:28:43 24 frequently, even the deposition to perpetuate -- and I don't know
09:28:48 25 the federal rule, but even that notion, deposition to perpetuate

1 prior to filing suit, there's a Fifth Circuit case law on that
2 that would suggest that that's not allowed in this kind of case.

3 So, you know, this issue of how do we find out the
4 facts so that we can plead it is -- in effect, they've put up a
5 theoretical --

6 THE COURT: Well, you're talking about different
7 things. You're talking about conduct on one, and you're talking
8 about policy or lack of policy on the other. That's what the
9 Supreme Court divided the liability up between employer and the
10 employee. And you're right, it's going to be a discoverable
11 problem, and you're going to need to discover it because the next
12 layer you're going to have is qualified immunity, and that's when
13 the policy will come up.

14 So you might look into that and see if you can get
15 that. And then, of course, the other problem in those cases is
16 once you name the city in the state law, for whatever reason, you
17 exempt the defendants. But these are federal causes of action.

18 Well, counsel, I didn't expect any answers, but I just
19 wanted you to know where the Court is.

20 MR. TITTLE: As a procedural matter, your Honor,
21 there's a couple -- there's several unopposed motions for leave
22 to amend complaints that are outstanding that you had put on
23 hold, I guess, till we had this hearing, and I would just bring
24 those to the attention of the Court.

25 THE COURT: Well, all I have now is motions to transfer

09:30:40 1 and motions to dismiss. So you have a matter of right to amend
09:30:43 2 at least once.

09:30:45 3 MR. TITTLE: I'm just bringing to the attention of the
09:30:47 4 Court that the unopposed motions have been filed with the
09:30:51 5 attached amendment. Just the Court -- I guess everything was put
09:30:54 6 on hold until this. So I'm just putting -- bringing it to your
09:30:59 7 attention that those are out there that remain.

09:31:01 8 THE COURT: Tell me again what you're -- a motion to
09:31:03 9 file an amended complaint?

09:31:05 10 MR. TITTLE: Those have been filed with the Court.
09:31:06 11 They just haven't been ruled on and I took it that they were --

09:31:11 12 THE COURT: Nobody's filed an answer in this case. So
09:31:16 13 as a matter of fact, you have the right to file an amended
09:31:17 14 complaint.

09:31:18 15 MR. TITTLE: I agree. They filed the motions to
09:31:21 16 dismiss that we've talked about. And then, the plaintiffs have
09:31:26 17 then amended the complaint to deal with many of those issues, and
09:31:29 18 they did not oppose the amendment. And so, I --

09:31:32 19 THE COURT: Doesn't make any difference if they oppose
09:31:34 20 or not. You have that right.

09:31:35 21 MR. TITTLE: I'm just saying that the Court hasn't
09:31:37 22 ruled on it yet and I was just pointing that to -- there's about
09:31:40 23 six or seven of them out there. Thank you.

09:31:42 24 THE COURT: Brittany, check, and if there's some first
09:31:44 25 amended complaint, allow all of them to be filed, notwithstanding

09:31:50 1 the rules giving that authority.

09:31:53 2 All right. I'm in recess.

09:31:55 3 MR. OLSON: Thank you, your Honor.

4 (End of proceedings.)

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UNITED STATES DISTRICT COURT)
WESTERN DISTRICT OF TEXAS)

I, LILY I. REZNIK, Official Court Reporter, United States District Court, Western District of Texas, do certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

I certify that the transcript fees and format comply with those prescribed by the Court and Judicial Conference of the United States.

WITNESS MY OFFICIAL HAND this the 14th day of June, 2016.

/s/Lily I. Reznik
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